

Legal Analysis:<sup>1</sup> Shaked's Proposal to amend the Administrative Affairs Courts Law<sup>2</sup>: Impact on Palestinians' Litigation

On 4 January, 2018, the Israeli Ministry of Justice published a proposal submitted by Israeli Justice Minister Ayelet Shaked to amend the Administrative Affairs Courts Law (5760-2000). The proposed bill stipulates the expansion of the jurisdiction of the Administrative Affairs Court to include the adjudication of petitions presented by Palestinians against Israeli authorities in the occupied West Bank. The Bill aims at transferring the exclusive jurisdiction over such matters from the Israeli Supreme Court, sitting as the High Court of Justice, to the Israeli Administrative Affairs Court in Jerusalem.

According to the memorandum circulated by the Justice Ministry, the proposed amendment includes **four major topics** pertaining to the actions of Israeli occupation authorities in the West Bank:

- 1- Requests submitted in accordance with the Freedom of Information Law: the Freedom of Information Law (5758-1998) is partially applied in the occupied West Bank and grants Palestinians the right to obtain information from Israeli public authorities. Petitions for the implementation of this right are heard before the Israeli High Court of Justice. According to the proposed amendment, the jurisdiction over this matter will be transferred from the HCJ to the Administrative Affairs Court in Jerusalem. Parties are entitled to object to the decision of the Administrative Affairs Court by filing an appeal before the Israeli Supreme Court, sitting as the High Court for Civil Appeals.
- 2- **Planning and construction**: the jurisdiction to deliberate in issues within the field of planning and construction, such as demolition orders or stopwork orders, will be transferred from the HCJ to the Administrative Affairs Court. Parties may appeal the ruling of the Administrative Affairs Court

<sup>&</sup>lt;sup>1</sup> JLAC published this Legal Analysis on February 2<sup>nd</sup> after Legal Unit workshop and discussions led by *Adv. Suliman Shaheen* in Jaffa on January 31<sup>st</sup>.

<sup>&</sup>lt;sup>2</sup> For the translation of the Proposed Amendment, please refer to Annex (1).

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before the High Court for Appeals. The proposed amendment enumerates some exceptions that include master plans and decisions taken by planning and construction authorities in quasi-legislative capacity. These will remain within the jurisdiction of the HCJ.

- 3- **Freedom of movement**, entry into, and exit from, the West Bank, and movement within the West Bank: the jurisdiction to deliberate in cases relating to freedom of movement, entry into, and exit from the West Bank will also be transferred from the HCJ to the Administrative Affairs Court. Parties may appeal the ruling before the High Court for Appeals.
- 4- **Restraining and supervision orders:** such orders are issued by a military committee, headed by a military judge, and accorded with quasi-judicial powers. The proposed amendment states that objections to the orders of these committees should be filed as an appeal before the Administrative Affairs Court rather than the High Court. If s/he objects to the decision of the Administrative Affairs Court, the appellant in this case is required to apply for leave to appeal.

# The justifications for the amendment

The Israeli Justice Minister Ayelet Shaked uses purely legal reasoning in the introduction to the bill and in the explanations of its foreseen impact. The Bill, she argues, will mitigate the burden imposed on the High Court by transferring a significant number of petitions from the Administrative Affairs Court, will increase the efficiency and efficacy of the justice system as a whole. This, the bill asserts, will also benefit those seeking judicial redress by insuring greater efficiency. The memorandum begins by stressing that this amendment is but a continuation of the project ushered by the enactment of the Administrative Affairs Courts Law at the dawn of the century. The Law sought to lay the foundations for the creation of an administrative department within the Israeli judiciary, namely within the district courts.

The proposed amendment does not recognize that the West Bank has a special status, nor, needless to say, does it adopt the internationally accepted definition of the West Bank as an occupied territory. As such, the proposed amendment does not perceive any dilemmas in imposing Israeli norms on Palestinian residents in the West Bank.



# Main objections to the Bill

- 1. Limiting or denying the procedural access to justice: Petitioners before the Administrative Affairs Court are charged with court fees that exceed those required by the HCJ. Palestinians face severe economic hardships and perpetual de-development imposed by Israel's long-standing military occupation, colonization, and exploitation of resources. Additionally, the Palestinian GDP per capita is drastically lower than Israel's as are minimum wages. Thus, court fees may represent a significant hurdle before the very possibility of filing a petition.
- 2. The inconsequentiality of international humanitarian law and international human rights law in the rulings of Israeli administrative affairs courts: Decisions by the Administrative Affairs Court exclusively rely on Israeli administrative and constitutional law, with IHL and IHRL virtually nonexistent in their reasoning. It should be noted, though, that the Israeli Supreme Court also relies primarily upon Israeli constitutional and administrative law and that the role of IHL and IHRL in its decisions is peripheral. Yet, following the proposed transfer of the jurisdiction from the Supreme Court to the Administrative Affairs Court, the marginalization of IHL will increase even further.
- 3. The conservatism of the Administrative Affairs Court: the Administrative Affairs Court, particularly the Jerusalem Court, is noted for its conservative leaning and formalist approach, generally refraining from judicial activism and overt interference in the decisions of public authorities unless decisions are procedurally flawed.

By no means does this conclusion imply that the current Israeli HCJ is progressive or particularly open to deeming practices of Israeli authorities in the West Bank illegal on substantive grounds.

In fact, the **HCJ has adopted an increasingly more conservative approach, systematically narrowing the scope of judicial review**, particularly as far as violations of Palestinian rights are concerned. While understanding this trend and recognizing that the HCJ does not necessarily provide Palestinians with a genuine resort to justice, it does, however, have a relatively wider margin for judicial review than the Administrative Affairs Court.



- 4. The ongoing tensions between the Justice Minister and the HCJ: Israel's right-wing and conservative Justice Minister, Ayelet Shaked, opposes even the limited interference of the HCJ in the decisions and practices of Israeli authorities in the occupied West Bank. She treats it as a form of judicial legislation, an infringement of the principle of the separation of powers, and a restriction against the Israeli army and civil administration. It could be argued that this proposed amendment is a manifestation of the conflict between Shaked and the HCJ and an attempt at curtailing the HCJ's powers.
- 5. The difficulty of challenging the bill in Israeli courts: The explicitly-legal justifications and reasoning behind this proposed amendment make it difficult to challenge it in court after the Knesset passes it. The Bill claims that it both serves the interests of the public and alleviates the burden imposed on the HCJ. Arguing that it is unconstitutional will be far-fetched, as the proposed amendment does not appear to violate Israel's Basic Laws. Perhaps the one major legal challenge against the proposed amendment is based on the ground that it limits the access to justice due to high court fees. This is more of a bureaucratic barrier that can be easily surmounted if the fees are reduced.
- 6. Buttressing Israel's de facto sovereignty in the West Bank: the proposed amendment treats the occupied West Bank as any other Israeli territory by subjecting it to the jurisdiction of the Administrative Affairs Court. The amendment represents an additional step in Israel's quest towards solidifying its sovereignty and legal, judicial, and military control over the West Bank. The memorandum does not recognize that the West Bank has any distinct legal status that warrants a different consideration. It indicates that placing the West Bank under the jurisdiction of the Administrative Affairs Court is logical, inevitable and fulfills the original objectives of the Administrative Affairs Courts Law. Stripping the West Bank of this status paves the way for de facto annexation and eventually de jure annexation.

The memorandum did not mention any political objectives behind the bill but any critical reading will unavoidably lead to this conclusion. Palestinian human rights and legal aid organization have repeatedly suggested that petitioning the HCJ in and of itself represents a moral compromise, a recognition of its legitimacy, and an acceptance of Israel's



sovereignty and control over the occupied West Bank. Some argue that objecting the practices of the Israeli army and civil administration at court contributes to the improvement of Israel's image and bolsters Israel's claim of providing Palestinians with justice and democracy.

And while we are conscious of the compromises we accept when seeking redress through Israeli law and at Israeli courts, we are simultaneously aware to the everyday needs of Palestinians and to the necessity of protecting their existence and defending their rights under occupation and within the current restrictions and available margins. **So important and urgent is this necessity that it outweighs the moral and theoretical criteria that cannot be overlooked nonetheless.** 

Once it comes into effect, though, this Bill will force us to confront a different reality that may lead us to re-evaluate our position. Should we accept the jurisdiction of the Administrative Affairs Court and if yes, should our criteria for filing petitions be modified to adapt to the changing circumstances?

The Jerusalem Legal Aid and Human Rights Center asserts that it is important to raise this issue in an internal Palestinian discussion attended by Palestinian human rights and legal aid organizations that file petitions at the Israeli Supreme Court. As a more advanced step, JLAC also suggest to expand this discussion to include the different Palestinian civil society actors and human rights defenders. Opening such a dialogue is necessary even before the Knesset votes to approve the Bill.



# **ANNEX (1): Unofficial Translation**

# **Proposed Administrative Affairs Courts Law**

Memorandum of Law no:803-10-2017-000061 Reference: 803-99-2017-046914

Memorandum of Law

# A. Name of proposed law

Proposed Administrative Affairs Courts Law (Amendment No....) (Authorization of the Administrative Affairs Courts to deliberate in administrative decisions of Israeli authorities operating in the Judea and Samaria Area), 5778- 2018

## B. The purpose and necessity of the proposed law

The purpose of the proposed law is to authorize the Administrative Affairs Courts to deliberate in administrative decisions of Israeli authorities operating in the Judea and Samaria area (hereinafter – the Area) in accordance with the principle of gradual empowerment prescribed by the Administrative Affairs Courts Law, 5760-2000 (hereinafter - the Law), all as detailed below.

The Administrative Affairs Courts Law, legislated in the year 2000, established, for the first time, administrative departments in the District Courts of Law in order to constitute a legislative framework for the gradual and orderly transfer of judicial jurisdiction from the High Court of Justice and the General Courts of Law to the District Courts, sitting as courts for administrative affairs.

The legislated law constituted the first stage in the process of structuring the judicial system in administrative affairs ultimately to be composed of three instances. In point of fact, in the explanatory notes of the draft of the Administrative Affairs Courts Law it was written "At this stage we are talking about creating administrative departments in the District Courts alone. At a later stage we will examine the possibility of establishing administrative departments in the Magistrate's Courts" (explanatory notes from the Administrative Affairs Courts Law, 5760 – 1999, 13- 2,4).

The proposal set forth seeks to integrate into the said process what is essentially two intertwined subprocesses - structuring a jurisdiction system for administrative affairs as one to be composed of three instances; distributing the substantive authority in administrative matters between the administrative jurisdiction courts according to the various types of proceedings.

It should be noted that concurrently with this proposal, two additional enactments are also being prepared which will also serve the above mentioned secondary processes; the first is the bill concerning the establishment of administrative departments in the Magistrate's Courts, published at the time as the proposed Administrative Affairs Courts Law (Amendment No. 75) (Magistrate's Court for Administrative Affairs), 5727-2012; the proposed bill was approved by the 18th Knesset in its first reading on 25 July 2012, and was subject to continuity in the 19th Knesset on 19 March 2014, in accordance with the Continuity of Debate Law, 5753-1993. The second enactment is an Administrative



Affairs Courts order (change in the additions to the law) which deals with the empowerment of the Administrative Affairs Courts to deliberate in additional administrative matters which are currently under the jurisdiction of the High Court of Justice and the jurisdiction of other courts.

The Ministry of Justice is working diligently to promote these two enactments, alongside the proposed law before us, and as part of the overall process as stated.

Returning to the set forth proposal; Section 1 of the Administrative Affairs Courts Law states that the purpose of the law is "to gradually empower the District Court sitting as the Administrative Affairs Courts to deliberate in administrative matters in the Supreme Court, sitting as a High Court of Justice or in other courts...".

Since legislation of the Administrative Affairs Courts Law and until today, extensive authorization in matters of administrative affairs has been transferred to the District Courts sitting as an Administrative Affairs Court. However, this did not include the substantive authority to deliberate in administrative decisions of Israeli authorities operating in the Area that remained under Supreme Court ruling, sitting as the High Court of Justice (hereinafter - the HCJ).

It is now proposed to empower the Administrative Affairs Courts to deliberate in administrative decisions of Israeli authorities operating in the Area, and in particular in the following four areas of activity - freedom of information, planning and construction, entry and exit matters (entering the Area, exiting from it and entry & exist - movement within the Area) and orders for restriction and supervision, all as proposed in the wording of the bill.

Authorizing the Administrative Affairs Court to deliberate in administrative decisions of Israeli authorities operating in the Area will result in these decisions not being heard before the HCJ as a first and last instance. It should be noted that data analysis regarding the amount of motions submitted to the HCJ each year indicate that a considerable number of the petitions are related to matters concerning the Area. What is more, it is claimed that empowering the Administrative Affairs Courts as said would contribute to reducing the considerable number of cases pressed upon the Supreme Court.

#### C. The main points of the proposed law

#### First point

According to the proposed law, article 5a will be added to the Administrative Affairs Courts Law which will define the scope of jurisdiction of the Administrative Affairs Courts to deliberate in administrative decisions of Israeli authorities operating in the Area. Moreover, according to the proposed Law, the Jerusalem Administrative Affairs Court will be granted exclusive authority to deliberate in these matters.

Proposed article 5a will authorize the Jerusalem Administrative Affairs Court to deliberate in two types of proceedings – administrative petitions in matters of the Area according to the Fourth addition, which will be added to the Law for this purpose and administrative appeals in matters of the Area according to the Fifth addition, which will be added to the Law for this purpose. It is also proposed that administrative petitions on matters of the Area and administrative appeals on matters of the Area will be heard according to the provisions of the Law as if they were an administrative petition under section 5(1) of the Law and an administrative appeal under section 5(2) of the Law.

#### Second point



The first area of activity proposed to be transferred to the jurisdiction of the Jerusalem Administrative Affairs Court is matters of freedom of information relating to Israeli authorities operating in the Area. It should be noted that the Freedom of Information Law, 5758-1998 has been partially applied in the Area, and most notably within local councils. It should be clarified that the matter of the bill, in this context, is not for Israeli authorities operating in the Area to implement the Freedom of Information Law, as this bill lacks the power for such action; the subject of the bill is to authorize the Administrative Affairs Court to deliberate in requests for information directed to Israeli authorities operating in the Area.

It is proposed that the Jerusalem Administrative Affairs Court will deliberate in requests for information from Israeli authorities operating in the Area by means of an administrative petition, according to item 1 of the Fourth addition which will be added to the Law as mentioned above. Thus, in accordance with the proposed Law on the judgment of the Administrative Affairs Court in the administrative petition, an appeal may be filed with the Supreme Court.

## Third point

The second area of activity proposed to be transferred to the jurisdiction of the Administrative Affairs Court in Jerusalem is planning and construction in the Area. It is proposed to authorize the Jerusalem Administrative Affairs Court to deliberate in most of the petitions in matters of planning and construction in the Area, similar to the current legal situation according to the First addition to the Law (for example, the current article relating to planning and construction in the First addition to the Law excludes ministerial decisions, therefore it is proposed to respectively exclude decisions by the commander of the IDF in the Area from the article relating to planning and construction in the Area), in addition to excluding decisions on other matters where sensitivity or complexity justifies (e.g. it is proposed to exclude a decision under article 34a of the Towns, Villages and Buildings Planning Law, No. 79 of 1966 which concerns the granting of a building permit for a building plan that was presented but not yet undertaken.

It is expected that the Jerusalem Administrative Affairs Court will deliberate in the matters of planning and building in the Area by means of an administrative petition according to item 2 of the Fourth addition which will be added to the above mentioned Law. Thus, in accordance with the proposed Law on the judgment of the Administrative Affairs Court in the administrative petition, an appeal may be filed with the Supreme Court.

#### Fourth point

The third area of activity proposed to be transferred to the jurisdiction of the Administrative Affairs Court in Jerusalem is matters of entry and exit - entering the Area, exiting from it and entry & exist movement within the Area. It should be noted that in these matters it is proposed to authorize the Jerusalem Administrative Affairs Court to hear most of the petitions whilst excluding matters where complexity or security sensitivity apply, (for example a decision concerning the granting of entry permits to a particular closed military zone for reasons others than for employment purposes, or for the Seam Zone).

It is proposed that the Administrative Affairs Court in Jerusalem deliberate entry and exit matters by means of an administrative petition, according to item 3 of the Fourth addition, which will be added to the above mentioned Law. Thus, in accordance with the proposed Law on the judgment of the Administrative Affairs court in the administrative petition, an appeal may be filed with the Supreme Court.



# Fifth point

# ANNEX (1): Unofficial Translation

The fourth area of activity proposed to be transferred to the jurisdiction of the Administrative Affairs Court in Jerusalem is the restriction and supervision orders issued in the Area. Since these orders are first heard before an Appeals Committee where military judges preside - it is proposed that the Administrative Affairs Court in Jerusalem deliberate these matters by way of administrative appeal according to item 1 of the Fifth addition, which will be added to the above mentioned Law.

Therefore, in accordance with the proposed Law and security legislation, a restriction or supervision order will be heard before the Appeals Committee in which military judges preside; the decision of the Appeals Committee may be appealed at the Administrative Affairs Court in Jerusalem by means of administrative petition, and the judgment of the Administrative Affairs Court in the administrative appeal may be appealed by submitting a Request to Appeal to the Supreme Court

In addition, it is important to note that in the proposed Counter Terrorism Law, 5775-2015, it was suggested to authorize the Administrative Affairs Court to deliberate restrictive orders issued in the State of Israel by means of an administrative petition. It should be mentioned that an administrative petition rather than an administrative appeal is proposed here since the current arrangement regarding the issuance of restrictive orders in the State of Israel and even that proposed in the proposed Counter Terrorism Law does not include a hearing of the limitation orders before a quasijudicial instance, such as the Appeals Committee, which deals with restriction and supervision orders issued in the Area. In any event, this portion of the Counter Terrorism Law was separated from the original Law and is currently being discussed in the Constitution, Law and Justice Committee of the Knesset. It goes without saying that the bill before us will be adapted if necessary to legislation that will eventually be passed in the Knesset regarding restrictive orders in the State of Israel.

# D. The effect of the proposed law on the existing law

According to the proposed law, article 5a will be added to the Law, as well as two further additions - the Fourth addition dealing with administrative petitions in matters of the Area and the Fifth addition dealing with administrative appeals in matters of the Area.

# E. <u>The effect of the proposed law on the state budget, on standards in government ministries and on the administrative aspect</u>

Additional regulations may be required for various relevant bodies such as the State Attorney's Office, the Courts Administration, the Judea and Samaria Legal Advisor and the Civil Administration. This matter will be consolidated in the continuation of the staff work.

F. <u>The wording of the proposed law:</u> The following is the text of the proposed law:

# Memorandum of Law on behalf of the Ministry of Justice:

Memorandum of the Administrative Affairs Courts Law (Amendment No...) (Authorization of the Administrative Affairs Courts to deliberate in administrative decisions of Israeli authorities operating in the Judea and Samaria Area), 5778-2018



1. In the Administrative Affairs Courts Law, 5760-2000 (hereinafter- the Principal Law), the following will be inserted after section 5 -

"The jurisdiction 5a The Jerusalem Administrative Court will deliberate theseof the Administrative Affairs Courts to deliberate in matters of the Area

(1) a petition against a decision of an authority or of a body operating in the Judea and Samaria area as enumerated in the Fourth addition in the specified matter of the Fourth addition, and except for a petition where the main Request for Relief concerns the enactment of the security legislation, including its cancellation, declaration of non validity or an order to enact it in the Area (hereinafter- Administrative petition in matters of the Area). An administrative petition in matters of the Area shall be deliberated in accordance with the provisions of this Law as if it were an administrative petition under section 5(1);

(2) An appeal enumerated in the Fifth addition (hereinafter - Administrative appeal in matters of the Area). An administrative appeal in matters of the Area shall be deliberated under the provisions of this Law as if it were an administrative appeal under section 5(2)".

2. After the Third addition to the Principle Law the following will come -

# "Fourth addition

#### Administrative petition in matters of the Area

(article 5a(1))

(1) Freedom of information - a decision by an authority in a request for information that is directed at it.

(2) Planning and construction - planning and building matters according to the following enactments -

A decision of an authority under the Towns, Villages and Buildings Planning Law, No. 79 of the year 1966 (hereinafter - the Law), under the order regarding Planning of Towns, Villages and Buildings (Judea and Samaria) (No. 418), 5731-1971 or according to the Order concerning issuing permits for work in territories seized for military needs (Judea and Samaria) (No. 997), 5742-1982, and all except for -

(A) A decision concerning offenses and penalties, including a decision under section 37 (b) of the Law;

(B) A decision relating to a master plan or a regional plan;

(C) A decision by the commander of the IDF forces in the Judea and Samaria area;

(D) A decision by the Head of the Civil Administration pursuant to Regulation 3 of the Regulations for Approval, Construction and Exemption from permits for temporary



roads for construction sites of regional importance (Temporary Provision) (Judea and Samaria), 5771-2011;

(E) A decision of the Head of the Civil Administration pursuant to Regulation 3 of the Approval, Construction and Exemption from a license for a temporary education structure (Temporary Order) (Judea and Samaria), 5770-2010;

(F) A decision of the Supreme Planning Council under section 7 (4) of the order regarding Planning of Towns, Villages and Buildings (Judea and Samaria) (No. 418), 5731-1971;

(G) A decision under section 34a of the Law

(3) Entry and exit -

(A) A decision by the Head of the Civil Administration pursuant to Section 1d of the order regarding Closed Zones (the West Bank Area) (No. 34), 5727-1967, to exempt a certain person from the application of the provisions of the said Order;

(B) A decision by a military commander under section 3 of the General Entry Permit (No.5) (Israeli residents and foreign residents) (Judea and Samaria), 5720-1970;

(C) A decision by the Coordinator of Government Activities in the Territories, or anyone acting on his behalf, pursuant to any procedure concerning the granting of a foreign entry visa to the Judea and Samaria area, except for such a decision as to the granting of a foreign visitor's permit by the Palestinian Authority;

(D) A decision by an authority regarding the granting of a permit to enter a closed military zone in the Judea and Samaria area for purposes of employment pursuant to the declaration regarding the Closure of Areas (Israeli Settlements) (Judea and Samaria), 5767 - 2002 and the Order regarding Employment of Workers in Certain Places (Judea and Samaria) (967), 5742-1982, and except for a petition whose principal Request for Relief concerns a decision to close the Area under the security legislation;

(E) A decision by an authority that relates to granting an entry permit to an area that is a Seam Zone, except for a petition whose principal Request for Relief concerns a decision to close the area under the security legislation; in particular the -"Seam Zone" - the area between the security fence and the Judea and Samaria area, which was declared a Seam Zone in the security legislation;

(F) A decision by an authority concerning the prevention of the departure abroad of a resident from the area according to the procedures of the Civil Administration.

Fifth addition Administrative appeal in matters of the Area (Section 5a (2))



(1) Appeal against the decision of the Appeals Committee under sections 296-297 of the Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770 - 2009"